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Issue Date: 16 November 2004

Case No.'s: 2000-LHC-02676

OWCP No.: 04-34646

In the Matter of:

LEA GREGG,
Claimant,

v.

UNITED STATES MARINE CORP./MWR,
Employer.

Appearances: Steven Birnbaum, Esq.
For the Claimant

Lawrence Postol, Esq.
For the Employer

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 ("the Act") as extended pursuant to the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. §8171, *et seq*. The Act provides compensation to certain employees (or their survivors) engaged in employment with Non-Appropriated Funds entities for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability or death. This claim was brought by Lea Gregg ("Claimant") against the United States Marine Corp./MWR (Employer), arising from cumulative industrial injuries suffered through February 1, 1994.

Procedural Background

On October 15, 1993, Claimant injured her lower back while working for the Employer. Claimant subsequently returned to work but experienced an increase in pain while performing inventory work for the Employer in January and February of 1994. The Employer paid benefits

and provided medical treatment. However, soon after, the Employer disputed the necessity of ongoing medical treatment.

On August 20, 1998, a formal hearing was held before Judge Michael Lesniak in Honolulu, Hawaii. The sole issue before Judge Lesniak was whether Claimant's ongoing medical care was reasonable and necessary as a result of her October 15, 1993 work injury. At the hearing, the Employer's medical expert, Dr. Henrickson testified that the October 15, 1993 injury had resolved within one week and she had suffered cumulative trauma, which he considered a new injury, in early 1994. August 20, 1998, Hearing Transcript at 80. Judge Lesniak found Dr. Henrickson's testimony less reliable and insufficient to show that medical treatment related to the October 1993 injury was no longer reasonable or necessary. 1998-LHC-698 (March 29, 1999). Finding it impossible to distinguish between how much of Claimant's ongoing medical needs were the result of her work injury and how much was due to her pre-existing back condition, the administrative law judge awarded past and continuing reasonable and necessary medical expenses.

On July 27, 1999, Claimant filed the present claim for compensation and medical care based on Dr. Henrickson's trial testimony that Claimant suffered a new injury in 1994. On October 18, 2000, the Employer filed a Motion for Summary Decision based on res judicata, collateral estoppel, election of remedies and untimely notice and filing of claim. On January 19, 2001, Administrative Law Judge David Di Nardi granted the Employer's Motion and denied Claimant's disability and medical benefits claim for her 1994 injury. 2000-LHC-2676.

The Benefits Review Board received Claimant's Notice of Appeal on February 15, 2001, and on February 14, 2002, the Board vacated the administrative law judge's granting of summary decision. BRB No. 01-0462 (not published). The Board held Claimant's claim for her 1994 injury was not barred by the doctrines of res judicata, collateral estoppel, and election of remedies. The Board further held that Claimant established genuine issues of material fact concerning whether her failure to provide timely written notice was excused under Section 12 and whether she timely filed her claim under Section 13. Accordingly, the latter issues were remanded for further consideration following the holding of an evidentiary hearing.

On November 14, 2002, the Director, Office of Worker's Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on August 20, 2003. A formal hearing was held before the undersigned on January 5, 2004, in Portland, Oregon, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-8, Claimant's exhibits ("CX") 1-15, and Employer's exhibits ("EX") 1-100, were admitted into the record.[1] Lea Gregg, David Gregg, and Scott Stipe testified at the hearing. The deposition transcripts of Dr. Robert Gordon, Dr. Thomas Rosenbaum, Dr. Brian Schulman, and Dr. Patrick Taylor, were accepted into evidence, and the testimony set forth therein was relied upon by the undersigned.

[1] All exhibits submitted by both Claimant and Employer after the hearing were accepted into evidence, and the information set forth therein was relied upon by the undersigned.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent.

Stipulations

The parties stipulate and I find:

1. The Act applies to this claim.

2. An employer/employee relationship existed as between Claimant and Employer during the relevant periods.

3. Claimant's compensation rate is $130.17.

Issues

The remaining issues to be resolved are:

1. Causation of Claimant's injuries.

2. Whether the claim was timely noticed and filed.

3. The date of maximum medical improvement.

4. The extent of Claimant's disability.

5. The Employer's entitlement to Section 8(f) Relief.

6. Claimant's entitlement to medical expenses.

7. Interest on past due benefits, if any.

8. Assessment of attorney fees and costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

Claimant first experienced back problems in 1991 while in the Marine Corp Reserves. Hearing Transcript "TR" at 105. Claimant pulled her hamstring two weeks into boot camp. During her period of rehabilitation, she performed some light duty work which caused her back pain. The Naval Hospital diagnosed Claimant with spondylolisthesis, grade one. EX 11 at 2. She

was later discharged from the Marines for erroneous enlistment, as it was determined her spondylolsis existed prior to enlistment. TR at 104; EX 11 at 2.

On November 25, 1991, Claimant reported to Dr. Foltz, with complaints of low back pain. EX 12 at 5. Dr. Foltz opined her pain was the same that had been bothersome to her intermittently since boot camp. During the examination, Claimant also mentioned she exacerbated her condition after cleaning her bathroom. Dr. Foltz prescribed Narcosis and Vicodin for her pain. At a follow up appointment on December 4, 1991, Claimant reported her condition had improved. EX 12 at 5.

In September of 1992**,** Claimant suffered a psychological breakdown while working for the American Greeting Card Company in Vancouver, Washington. TR at 107. Following an altercation with a customer Claimant spent six hours, "thinking of ways she could rip her to shreds." TR at 107. On September 29, 1992, Claimant was examined by Dr. Foltz. EX 12 at 10. Dr. Foltz diagnosed Claimant with symptoms of anxiety with a very small component of depressive overlay and prescribed Zoloft for her condition. EX 12 at 10.

In August of 1993, Claimant relocated to Quantico, Virginia with her husband. Before the move she felt emotionally and physically well. TR at 110. Claimant began working as a stock clerk for the FBI Academy. TR at 115. The position required pricing and stocking uniforms, throwing out trash and vacuuming the rugs. TR at 116. Claimant's duties required frequent use of her lower back as she was repeatedly lifting 30-50 pound boxes and stooping to place merchandise on lower shelves. TR at 117-8.

On Friday, October 15, 1993, Claimant injured her lower back while working for the Employer. As she attempted to move a box of trash she lost her balance, and fell backwards striking her lower back on a metal door handle. TR at 118-119. Claimant reported the incident to her manager and went home. TR at 119. Claimant returned to work on Monday, but was sent to the occupational clinic at the military hospital because of continued back pain. TR at 119. Claimant was released to work with no restrictions. TR at 120.

In January of 1994, Claimant began performing inventory. Inventory duties involved lugging boxes, weighing 50-130 pounds apiece, out of stock rooms. TR at 121. The boxes were difficult to handle and approximately 2-3 days into the job she experienced pain in her lower back. TR at 123. Claimant reported the pain to her manager, who reported the situation to the supervisor. Although the supervisor monitored the situation, Claimant's pain increased as time went on.

In February of 1994, Claimant further injured her back while working inventory. In order to avoid a stack of collapsing boxes, Claimant thrust her pelvis forward. TR at 127-8. The next day, Claimant called her manager from home because she was in terrible pain and could barely walk. Claimant testified that although her manager and supervisor were aware of the incident, no one offered her a report of injury form. TR at 130.

On March 4, 1994, Claimant reported to Dr. Neil Kahanovitz with complaints of persistent low back pain. Dr. Kahanovitz, an orthopedic surgeon, performed a comprehensive

examination. X-rays revealed mild grade 1 spondylolisthesis and a pars defect at L-5. Dr. Kahanovitz prescribed physical therapy to alleviate her symptoms. EX 14 at 2. On April 14, 1994, Dr. Kahanovitz placed Claimant on light duty work with a lifting restriction of 20 pounds and a one hour limit on standing in one place at one time. EX 14 at 3.

In May of 1994, Claimant was assigned to a clerical position. TR at 135. Claimant's clerical duties were expanded as she was required to climb up and down several flights of stairs to deliver documents. Claimant reported increased pain in her lower back to her supervisor. On June 9, 1994, Claimant reported to Dr. Kahanovitz complaining of difficulty doing light duty work. EX 14 at 4. Due to the failure of conservative care, Dr. Kahanovitz opined Claimant was a candidate for surgery. EX 14 at 4. In his June 14, 1994 medical report, Dr. Kahanovitz opined Claimant's surgery was a direct result of her October 15, 1993 injury. EX 14 at 5. He noted the injury aggravated a pre-existing condition which had not been symptomatic and had not hindered her from engaging in normal activities.

On July 6, 1994, Claimant underwent an L5-S1 fusion and insertion of a bone growth stimulator, performed by Dr. Kahanovitz. TR at 137. Claimant received temporary total disability from February 9, 1994 through May 10, 1994, stipulated to by the parties at a compensation rate of $130.17 per week. EX 2. Claimant received temporary partial disability from May 11, 1994 through July 5, 1994 at the rate of $43.40 per week.[2] Claimant also received temporary partial disability from July 6, 1994 through May 25, 1995 at the rate of $130.17 per week.

On February 7, 1995, Claimant underwent another surgical procedure, as Dr. Kahanovitz removed the electrical bone graft stimulator. Claimant's relief was only temporary, as her symptoms returned. EX 14 at 11. Dr. Kahanovitz prescribed physical therapy and on May 18, 1995, he placed Claimant on light duty work with restrictions that included no lifting or reaching overhead, and no bending or twisting. TR at 139; EX 16 at 1.

In May of 1995, Claimant returned to work as an audit clerk in the convenience store on base. TR at 141. She was occasionally asked to fill in for cashiers. TR at 141. Claimant's cashier duties were physically demanding as she was bending, twisting and standing for long periods of time. TR at 142. While only half of her time was spent doing cashier work, her lower back pain increased "immensely and very rapidly." TR at 142-3. Claimant reported the increase in pain to her manager, Bill Barry, and he recommended getting Claimant assistance. Claimant accepted, but the offer was never fulfilled. TR at 143. Claimant quit her position at the convenience store after she was verbally bombarded by a purchaser about her bookkeeping abilities and the assistant manager failed to intervene. TR at 145. In a request for personnel action dated November 6, 1995, Claimant resigned due to "Harassment primarily by Vicky Bartlett, Kathy Swim, others to be named in the lawsuit, and medical reasons – back." EX 6.

Claimant's husband David Gregg, confirms the pain she experienced while working at the convenience store. Mr. Gregg testified that Claimant's cashier duties made her condition worse and when she returned home from work, "She would just lay on the horn of the truck and

[2] Claimant testified she retuned to work from May 11, 1994 through July 5, 1994 to supplement her disability payments.

I'd have to go out and carry her into the house because she wasn't capable of walking herself." TR at 71. Claimant told Mr. Gregg that she quit her position at the convenience store due to lower back pain. TR at 72.

On November 14, 1995, Claimant was examined by Dr. Stuart Stark, a neurologist. EX 17. Claimant was referred to Dr. Stark by Dr. Kahanovitz for an evaluation of chronic lower back and lower extremity symptoms. EX 17 at 1. Dr. Stark noted Claimant's symptoms were unusual in their distribution and the acute nature in which they incapacitated her. EX 17 at 3. During a follow up visit on November 16, 1995, Dr. Stark diagnosed Claimant with severe myofascial pain associated with sacroiliac dysfunction. He recommended a physiatry consultation with Dr. Abraham Cherrick. EX 17 at 4.

On January 2, 1996, Claimant was examined by Dr. Abraham Cherrick, a physiatrist at the Center for Physical Medicine and Pain Management. EX 39. Dr. Cherrick diagnosed Claimant with regional myofascial disorder as well as chronic pain syndrome. He recommended that she take Pamelor. EX 39 at 2; TR at 145.

In 1996 Claimant relocated to Hawaii with her husband and began working for Aloha Key and Awards. Claimant's Deposition Transcript ("EX 9") at 59. Claimant's duties included sales and cashier work, small engraving jobs, cutting keys, and checking in merchandise approximately 20 hours per week. Even though the job duties were compatible with Claimant's work restrictions, she continued to experience pain and subsequently quit. TR at 153; EX 9 at 61.

On June 11, 1996, Claimant reported to Dr. Thomas McNorton, a neurologist. Claimant complained of continued lower back pain. EX 20. An EMG/NCV revealed findings consistent with a very mild left L5-S1 radiculopathy. EX 20 at 5. Based on these findings, Dr. McNorton opined Claimant was not a surgical candidate.

On September 30, 1996, Claimant reported to Dr. John Henrickson, a neurologist in Honolulu, Hawaii. EX 21. Dr. Henrickson performed an independent medical examination at the Employer's request. EX 21 at 1. He diagnosed Claimant with a mild left L5-S1 root irritation and found no objective palpable findings of myofascial pain syndrome or dysfunction. EX 21 at 11. He recommended against physiatry and physical therapy treatment, and opined Claimant should be taken off her current pain medications due to possible drug-seeking behavior. Dr. Henrickson recommended a psychiatric evaluation, unrelated to Claimant's back condition. Claimant was not a surgical candidate at the time of examination. Dr. Henrickson recommended Claimant's return to work on a gradual basis with an initial lifting/carrying restriction of 10-15 pounds. EX 21 at 12.

As to causality, Dr. Henrickson opined Claimant's October 15, 1993 injury was a temporary contusion to the left low back with no neurological symptoms that resolved in a matter of days. EX 21 at 10. He also noted the injury would not cause any disruption of the L5-S1 motion segment and in no way necessitated the subsequent surgery in 1994. Dr. Henrickson

also noted Claimant experienced significantly increased pain related to lifting activities while doing inventory work in January and February, 1994.[3]

On September 12, 1997, Claimant reported to Dr. Kenneth Kaan at the Spine Care Center of Hawaii. EX 25. Dr. Kaan performed an independent medical examination at the request of the Employer. He was unable to diagnose the etiology of Claimant's low back pain as the examination revealed a reasonably solid fusion. EX 25 at 2. He opined that Claimant's current problems stemmed from her October 1993 injury and made no mention of the increased pain suffered in early 1994. Dr. Kaan recommended active physical therapy with a home program, vocational rehabilitation services, pain management and a psychology or psychiatry consultation. EX 25 at 3. At the time of examination, Claimant had not yet reached maximum medical improvement.

On March 6, 1998, Claimant underwent surgery to remove painful hardware and electrodes. EX 29. The surgery failed to relieve her symptoms.

On June 4, 1998, Claimant underwent an independent medical exam with Dr. Gregory Chow. EX 30. Claimant was diagnosed with failed back surgery syndrome, status-post L5-S1 fusion for spondylolsis and spondylolisthesis, possible complete fusion, left side L5-S1, chronic pain syndrome and possible bipolar disorder. EX 30 at 11. Dr. Chow opined Claimant's prognosis was poor and that she had reached maximum medical improvement at the point when she completed her physiatry treatments in Virginia. He recommended psychological counseling and chronic pain management and believed her suitable for sedentary to light work at 4-6 hours per day. EX 30 at 12.

On August 20, 1998, Administrative Law Judge Michael Lesniak awarded past and continuing medical expenses related to Claimant's October 1993 work injury. EX 1.

In 1999, Claimant relocated back to Virginia with her husband. TR at 153. Assuming that she would need more surgery, she resumed her care with Dr. Cherrick and Dr. Mason. TR at 153.

On July 27, 1999, Claimant filed a claim for compensation and medical treatment arising from cumulative industrial injuries suffered through February 1, 1994. EX 3 at 2.

On July 29, 1999, Claimant was examined by Dr. Thomas Larkin at the Pain Management Center in Washington, DC. EX 34. Dr. Larkin diagnosed Claimant with lower back and lower extremity pain of unknown etiology. EX 34 at 1. Dr. Larkin opined there was nothing further to offer the Claimant as all modalities that he would offer had already been attempted without success.

On August 3, 1999, the Employer filed a First Report of Injury and Notice of Controversion of Right to Compensation. EX 4 and 5. The Employer controverted any payment on the claim per sections 12 and 13 of the Act, arguing compensation is time barred due to late reporting, collateral estoppel and res judicata. EX 5.

[3] Dr. Henrickson later testified at the 1998 hearing that Claimant suffered cumulative trauma in early 1994, which he considered a new injury. August 20, 1998 TR at 80.

On November 11, 1999, Claimant was examined by Dr. Cherrick. EX 39. Dr. Cherrick opined that all of Claimant's treatment to date had been medically necessary. Ex 39 at 4. Claimant began a course of physical therapy in December of 1999, and by June of 2000 her condition had improved. EX 39 at 20. However, by August of 2000, Claimant reported continued pain, moderate to severe in degree. EX 39 at 24. Dr. Cherrick ultimately opined that therapy had reached its limits as Claimant's condition had stabilized.

On September 19, 2000, Claimant was examined by Neurosurgeon Dr. R. Bryan Mason for a medical assessment of her ability to do work related activities. EX 42 at 1. Dr. Mason opined that Claimant could perform light duty and sedentary work with a lifting restriction of 20 pounds, and no prolonged standing or sitting. EX 42 at 1-4.

On September 28, 2000, Claimant was examined by Dr. Cherrick. CX 39 at 30. Claimant reported that her condition was worse as she had bolting, lightning type pain into her left buttock. She also noted her pain was severe and increased with any activity or movement. Claimant was not getting relief from therapy or injections. By April 2001, Claimant had scheduled surgery to treat her failed fusion. CX 39 at 34.

On October 3, 2000, Claimant was examined by Dr. Gordon. EX 43.[4] At the request of the Employer, Dr. Gordon was asked to comment on Claimant's ability to work. EX 43. Dr. Gordon opined Claimant had subjective pain complaints that were markedly out of proportion to anything reported in the studies performed. EX 43 at 2. From a strictly orthopedic point of view, Dr. Gordon concluded that Claimant had the physical capacity for full-time employment in light or sedentary work activity. EX 43 at 3.

In his November 2, 2000 supplemental report, Dr. Gordon commented on Claimant's prior treatment and causality. EX 44 at 1. Dr. Gordon opined that from an objective musculoskeletal basis, there were no medical records or radiographic reports indicating a permanent aggravation of Claimant's pre-existing back problem. Rather, Claimant's complaints prior to and following surgery were to a large extent on a nonphysiologic basis. Dr. Gordon concluded the injuries occurring at work were soft tissue in nature and the surgery and treatment that followed were not related to any anatomical abnormalities caused by or permanently aggravated by her work-related injuries. EX 44 at 1.

On November 15, 2000, Claimant was examined by Dr. Schulman. EX 46.[5] In his medical report, Dr. Schulman opined that Claimant has three significant psychiatric conditions:

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[4] Dr. Gordon's curriculum vitae is contained in the record at CX 57. Dr. Gordon specialized in spine problems. CX 17 at 11. While he has no specific fellowship training in back surgery, his elective surgery experience over the last number of years has been in the area of joint replacement surgery. However, it has been 10 years since he performed elective surgery. CX 17 at 9-10.

[5] Dr. Schulman performs occupational psychiatry and specializes in work-related disorders, disability, worker's compensation, occasional third party issues, and fitness for duty. He is also a member of the American Board of Independent Medical Examiners, and testified that he considers himself an expert on stress in the workplace and on chronic pain syndrome. Id at 12; EX 55.

bipolar disorder, premenstrual mood disorder and psychogenic pain disturbance. EX 46 at 20. All three psychiatric disorders were preexisting conditions and none were causally related to the October 15, 1993 occupational incident or to the increased pain she experienced in January and February, 1994. Id. Dr. Schulman concluded Claimant's mental and behavioral conditions do not preclude her ability to function in gainful employment. *Id*.

On May 22, 2001, Claimant underwent an L5-S1 laminectomy with fusion and instrumentation, performed by Dr. Mason. EX 49; TR at 158.

Following surgery, Claimant underwent a series of examinations with Dr. Cherrick. Claimant was reevaluated by Dr. Cherrick on June 28, 2001. Claimant rated her pain as a 2 on a 10-point scale and had weaned herself off her medications. EX 51 at 3. Dr. Cherrick examined Claimant on November 20, 2001. EX 51 at 7. He opined that her condition was improving despite some residual pain, and referred Claimant for physical therapy. EX 51 at 5. Claimant's final visit with Dr. Cherrick was on March 26, 2002. EX 51 at 7. Dr. Cherrick concluded that Claimant's condition had improved. However, he opined that she required aquatic therapy, and recommended an "endless pool" be constructed in the back of her home for long term maintenance of her musculoskeletal problems. EX 51 at 8.

Claimant was reevaluated by Dr. Gordon on April 2, 2002. EX 52. Claimant reported that she felt much better since her surgery and was off her medication. EX 52 at 1. Dr. Gordon opined that Claimant's condition had improved and that, "she looks like a totally different person than when I saw her in October of 2000." He opined Claimant's getting off her medication was an excellent idea and it appeared that the she may have gotten relief from surgery, even though he still maintains that her symptoms when he saw her previously were markedly out of proportion from what one would have expected on a physiologic basis. Dr. Gordon opined if Claimant's fusion heals well, she has the physical capacity to resume light or sedentary work activities. EX 52 at 1-2.

In May or June of 2002, Claimant moved with her husband to Oregon. Claimant's Deposition, April 23, 2003 ("EX 68") at 4.

Claimant was examined by Dr. Foltz on October 31, 2002. She reported low back pain and admitted that her condition was stable. Although it had been many years since she visited with him, Claimant requested that Dr. Foltz monitor her condition and provide a prescription for hydrocodone. EX 66 at 1. Dr. Foltz diagnosed Claimant with chronic low back pain and provided a prescription for Vicodin. *Id*. at 2.

On Thanksgiving of 2002, Claimant misjudged a step or change in height on the flooring and fell forward down to her knees. After the fall she felt fine and continued on with the holiday. TR at 164. However, three days later she awoke with a swollen left ankle and realized pain in her lower back that persists to this day. TR at 165 and 167. Dr. Foltz recommended physical therapy and placed Claimant on medication, and referred her to Dr. Adler, a neurosurgeon. EX 66. Dr. Adler examined Claimant approximately 3-4 times and concluded there was nothing he could do for her. TR at 169-170.

On December 18, 2002, Claimant was reexamined by Dr. Foltz, who prescribed physical therapy. EX 66 at 2. Claimant continued with physical therapy through March of 2003, but her condition was not improving.

On March 20, 2003, Claimant was examined by Dr. Rosenbaum, at the Employer's request.[6] EX 59. Claimant reported left low back pain. EX 59 at 3. In his medical report, Dr. Rosenbaum agreed with Dr. Gordon's conclusion that Claimant's work injury did not cause her pathology or contribute significantly. EX 59 at 5. Dr. Rosenbaum also opined Claimant's surgical and intervening treatments had been directed at her preexisting spondylolysis and spondylolisthesis. At the time of exam, he opined Claimant was capable of performing light or sedentary work activities with a 50 pound lifting limit on a non-repetitive basis. At the time of examination, Claimant had reached maximum medical improvement. CX 18 at 51.

At the time of her deposition in April of 2003, Claimant was still receiving physical therapy and injections. EX 68 at 37-8. However, they failed to relieve her symptoms. *Id*. at 38.

On April 11, 2003, Dr. Foltz was forced to resign as Claimant's physician because he was called for active duty in the Army Reserves. EX 68 at 39; CX 5 at 12. However, on April 9, 2003, the Employer's attorney requested that Dr. Foltz review documents and answer questions related to Claimant's condition for the purpose of defending against her worker's compensation claim. EX 70 at 2. Dr. Foltz was able to take a few hours off from his active duty military assignment and on May 19, 2003, he responded to the letter stating that he did not dispute the opinions of Dr. Gordon, Dr. Schulman and Dr. Rosenbaum. EX 70 at 2-3. He later concluded that Claimant's 1994 injury was not the cause of her current condition.

On June 16, 2003, Claimant was examined by Dr. Jonathon Blatt. CX 4. Claimant's chief complaint was low back pain due to her fall on Thanksgiving in 2002. Dr. Blatt diagnosed Claimant with "low back and left lower extremity pain, status post laminectomy, likely neuropath pain, given her history and physical exam findings." CX 4 at 8. Believing it futile to repeat trials of epidural steroid injections, Dr. Blatt prescribed Neurontin and recommended an anti-depressant. Id. Claimant was reevaluated on June 30, 2003 and reported positive responses to Neurontin. *Id*. at 10. However, by her July 15, 2003 reevaluation, the pain had returned. *Id*. at 11.

On December 24, 2003, Claimant suffered from low back pain a month before the 1993 injury. A September 2, 1993, Naval Medical Clinic report stated that Claimant needed Zoloft and Tylenol #3, a narcotic, for chronic hip pain, presumably related to her back. CX 18 at 37-8. The fact that Claimant sought a narcotic rather than an over-the-counter medication indicates she was suffering from above average pain. *Id*. at 29. Had her pain not flared up during the inventory period on the job, Claimant would likely have recovered from the injury of October 15, 1993, at least in time and barring no further injury. *Id*. at 31. Thus, ongoing medical care thereafter was more due to the cumulative trauma period than to the incident of October 15, 1993. *Id*. at 31. Dr.

[6] Dr. Rosenbaum's curriculum vitae is contained in the record at exhibit EX 60. Dr. Rosenbaum is a board certified neurosurgeon, but currently specializes in the spine. TR at 12.

[8] Dr. Rosenbaum testified a successful fusion patient may still have pain if/because the fusion did not help their basic problem, which seems to be the case here. *Id*. at 26.

Taylor also noted that Claimant's Thanksgiving fall and the resulting pain was not a new injury, but was an aggravation of her pre-existing work injuries. *Id*. at 31. As to future medical care, Claimant is in need of periodic pain management evaluation, possible trigger point injections and a renewal of her medication. *Id*. at 30. Claimant is not a candidate for surgery, but some form of psychiatric or psychological treatment is necessary. *Id*. at 30. At the time of examination Claimant was not in a position to return to light duty work. *Id*. at 31.

Dr. Rosenbaum was deposed on December 24, 2003. CX 18. He testified that Claimant suffered from low back pain a month before the 1993 industrial injury. A September 2, 1993, Naval Medical Clinic report stated that Claimant needed Zoloft and Tylenol #3, a narcotic, for chronic hip pain, presumably related to her back. CX 18 at 37-8. The fact that Claimant sought a narcotic rather than an over-the-counter medication indicates she was suffering from above average pain. *Id*. at 39-40. He also testified that Claimant was employable in a sedentary light to low moderate job with a 50 pound lifting limit on a non-repetitive basis. CX 18 at 56. Claimant also has a psychological component to her symptomatology as she has subjective symptoms without objective verification.[8] Doctors normally place individuals with subjective symptoms and no sense of objective findings, on a 35-50 pound lifting limit. Therefore, from an objective standpoint, he opined Claimant is capable of lifting a maximum of 50 pounds non-repetitively a few times a day with postural changes. *Id*. at 42 and 44. However, from a strictly anatomic physical capacity, there is no limit on what she can lift on a job. *Id*. at 43.

The deposition of Dr. Schulman was taken on January 16, 2004. CX 19. Dr. Schulman testified that Claimant has suffered from chronic pain syndrome since at least 1991; however her condition was asymptomatic prior to her tenure in the Marine Corp. CX 19 at 44. He describes the general characteristics of psychogenic pain as exaggerated displays of discomfort, excessive preoccupation with pain, and perseverance in seeking a medical solution to pain despite having been advised on numerous occasions of the lack of a medical basis for their complaints. CX 19 at 32. While Dr. Schulman does not believe Claimant's psychogenic pain is not entirely volitional, he testified that some of her conduct is malingering as she tries to get medical treatment and establish herself as a disabled person. CX 19 at 69 and 78. However, after viewing the surveillance film, he testified that Claimant is consciously overstating her pain complaints. *Id*. at 80.

Dr. Schulman also testified that Claimant's preexisting psychiatric disorders were disabling to her, as indicated from her early history. CX 19 at 35. Claimant has had significant problems functioning throughout adult life, has been unable to sustain a period of employment for more than 3 or 4 months, and has had a number of very transient jobs, none of which developed into any pattern of career development.[9] He opined this is particularly relevant as Claimant is an intelligent person. While preluteal mood disorder and psychogenic pain disturbance can interfere with the ability to work, Dr. Schulman believes Claimant's condition would improve if she were working. CX 19 at 68 and 72-73. Working provides daily structure, activity, and the ability to interact with people socially. This lack of structure and activity breeds functional regression. Furthermore, the longer one is out of work, the harder it is to go back into

[9] Dr. Schulman testified that regardless of any work related injuries, Claimant would still suffer from her psychiatric disorders. CX 19 at 62.

the work force. CX 19 at 65. Dr. Schulman stated that worklessness, "….isn't just lost time but it's a pervasive problem, it's a void in their lives and creates in and of itself significant impairment." CX 19 at 20.

Dr. Taylor's deposition was taken on February 3, 2004. CX 20. Dr. Taylor testified that Claimant's pre-existing spondylolisthesis made her vulnerable prior to the October 1993 accident. CX 20 at 17. Claimant's October 1993 injury contributed to and aggravated her previous mechanical defect. Claimant's inventory work at the end of January and early February of 1994, also accelerated, hastened or made worse the previous injury. CX 20 at 18-19. Dr. Taylor testified that but for Claimant's 1994 injury, she would more likely than not have recovered from her 1993 injury because she was working until the inventory incited the preexisting problem, which then made the problem insurmountable. Absent the 1994 injury, she would have recovered, barring any new injury. CX 20 at 99.

Dr. Taylor further opined that Claimant's condition did not improve with surgery, rather to some degree she was getting worse as she was unable to work. CX 20 at 20. As to have pain that they have to the failure of the surgery or the injury itself and builds from there, bringing on anger, depression and anxiety. CX 20 at 29. Claimant took narcotics for her chronic pain; however, she was not progressing. The response was further surgery, which seemed successful and lasted until Thanksgiving of 2002, when her pain recurred. CX 20 at 35. The fall on Thanksgiving would not have brought about such difficulty without her previous back problems. CX 20 at 37. Since the fall in 2002, Claimant has experienced persistent pain to the point where she cannot function very well. This resulted in her return to chronic pain management, further psychological treatment, and narcotic medication to alleviate symptoms. *Id*. at 37-38.

Dr. Taylor also testified to the inaccuracy of surveillance films as they usually do not take a long enough period of time, and they catch the subject when it really does not show enough to reach a conclusion. *Id*. at 53. Additionally, it is characteristic of people, even when they continue to have pain, to get through their day and they do things that hurt or that may later cause residual soreness or pain. CX 20 at 52.

Dr. Gordon was deposed on April 29, 2004. CX 17. He testified that Claimant has spondylolysis and a congenital type of spondylolisthesis because of a defect in her Pars interarticularis, the bony connection between the vertebra above and vertebra below. CX 17 at 41. Medical records indicate Claimant had a significant history of back complaints and a congenital anomaly of her lower back well before any of the work related injuries occurred. *Id*. at 42 and 45. He testified Claimant's pain arose from inflammatory changes in that area as a result of the spondylolisthesis. CX 17 at 42. Dr. Gordon testified this is not a condition that is always painful, however it can become painful if there is a small amount of instability in that area. Strenuous activity can cause instability making one more likely to be symptomatic. CX 17 at 33-34. Additionally, Dr. Gordon testified the surveillance film, clearly indicates Claimant can perform light to sedentary duty work. CX 17 at 73.

At the time of trial, Claimant testified her daily activities involved sitting and watching television, and attending doctor appointments. TR at 173. She continues to have severe back pain, as any activity makes her pain worse. TR at 173. Claimant's medication affects her

concentration and causes her to be unsteady on her feet. TR at 176. She is emotional and has problems sleeping. TR at 178. While Claimant testified that she investigated the alternate jobs listed on the vocational rehabilitation report, she believes she is physically and mentally unable to perform the work and lacks the necessary skills. TR at 180. However, she testified that she would like to work again and be active.

Mr. Gregg testified that Claimant's condition has interfered with their marital relationship. TR at 71. The enjoyment and intimacy of their 18 year marriage has deteriorated. TR at 71. Claimant used to be outgoing, but since her injuries she has no joy in her life, as "It's been a very rough emotional time." TR at 77. Mr. Gregg testified that he has been married to Claimant for more than 18 years and can read her; he does not believe Claimant is fabricating any of her pain.

II. Discussion of Law and Facts

Causation

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment and the burden shifts to the employer to establish that claimant' s condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes, supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 615, *rev'g*, *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to section 2(2) of the Act. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP,* 640 F. 2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Co.*, 22 BRBS 376 (1989) (decision and order on remand); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury

contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte, supra.*. Also, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Mijangos*, 19 BRBS at 17; *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

I have weighed all the evidence in light of the case law set forth hereinabove and find that Claimant has established that she suffered a cumulative industrial injury on February 1, 1994, while working for the Employer. First, there is no question that Claimant suffered from spondylolisthesis grade 1 as early as 1991. EX 44 at 2. While Claimant may have suffered from intermittent periods of pain due to her vulnerable lower back condition, her condition was relatively asymptomatic until her work related injury on October 15, 1993. Claimant continued working, further aggravating her condition in January of 1994, while performing inventory work for the Employer. TR at 123. Inventory work was strenuous, as Claimant was required to lift and carry boxes weighing anywhere from 50-130 pounds apiece. TR at 121. Claimant testified the boxes were difficult to handle and she experienced pain 2-3 days into the job. TR at 123. In February of 1994, Claimant hastened or made worse her previous injury when she attempted to avoid a stack of falling boxes. TR at 127-8. While such inventory work may be deemed strenuous for any employee, these activities were especially strenuous for Claimant whose lower back was vulnerable due to her pre-existing spondylolisthesis and work injury in October of 1993. Following the incident, Claimant ceased her inventory work and was released to light duty work by Dr. Kahanovitz. EX 14 at 31. Therefore, based on the above, the undersigned finds that any ongoing medical care thereafter was more due to the cumulative trauma period than to the incident on October 15, 1993.

Third, Claimant's psychological problems were accelerated or made worse by the cumulative injury in 1994. The Employer relies on Dr. Schulman who opined that Claimant suffers from three psychiatric conditions: bipolar disorder, premenstrual mood disorder, and psychogenic pain disorder. EX 46 at 1. However, Dr. Gordon's testimony is conflicting as he also admitted that an MRI does not measure pain. CX 19 at 51. The fact that an MRI does not measure pain validates that Claimant continued to suffer a significant increase in pain due to her lifting activities in January and February 1994, but the pain was not reflected in her medical tests. In contrast, both Dr. Henrickson and Dr. Taylor credibly opined that the inventory incident in 1994 was significant and made worse her previous injury. Dr. Henrickson opined that the January and February 1994 lifting incidents caused a significant increase in pain and went as far

as to opine that the accident constituted a new injury. August 20, 1998 Hearing, TR at 80.[11] Dr. Taylor also opined that the February injury accelerated or made worse the previous injury and was so significant that it forced Claimant off the job. CX 15 at 29. Had the 1994 injury not occurred, Dr. Taylor opined that Claimant would have likely recovered from the October 1993 injury at least in time and barring any further injury. *Id*. at 31. Therefore, based on the above, the undersigned finds that any ongoing medical care thereafter was more due to the cumulative injury in 1994 and the resultant failed surgery.

Third, Claimant's psychological problems were accelerated or made worse by the cumulative injury in 1994. The Employer relies on Dr. Schulman who opined that Claimant suffers from three psychiatric conditions: bipolar disorder, premenstrual mood disorder, and psychogenic pain disorder. EX 46 at 20. He further contends that the conditions were pre-existing and not caused or aggravated by her work activities. CX 19 at 35. On the other hand, Dr. Taylor diagnosed Claimant's chronic pain syndrome as secondary to her initial trauma. CX 15 at 30. He further reasoned that Claimant's condition was a reaction to the failure of surgery or therapy, bringing on anger, depression and anxiety. CX 20 at 29. A judge is not bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his judgment to resolve conflicts in the medical evidence and is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). As such, the undersigned finds Dr. Taylor's conclusions more credible as to the extent of Claimant's psychiatric condition. While the evidence reflects that Claimant has a history of psychiatric problems, her condition was relatively mild in nature as it did not restrict her ability to work and did not hinder her from engaging in normal activities. However, after the cumulative injury in 1994, and the resultant failed surgery, Claimant was unable to work due to constant pain, was emotionally withdrawn and distraught, and was constantly seeking medication to alleviate her physical and psychological symptoms. Therefore, based on the above, the undersigned finds that Claimant's psychological problems were accelerated or made worse by the cumulative injury in 1994 and the resultant failed surgery.

Fourth, Employer's argument that Claimant's fall on Thanksgiving Day 2002, was an intervening event is not persuasive. The Employer contends that Claimant was pain free and off narcotic medication for more than a year leading up to the incident. While Claimant's condition may have been improving, evidence in the record demonstrates that not only was Claimant not "pain free," she was still receiving treatment and taking medication for her symptoms. During a November 20, 2001 examination, Dr. Cherrick noted Claimant was suffering from residual pain and referred her to physical therapy. EX 51 at 7. On March 26, 2002, Dr. Cherrick opined that Claimant required aquatic therapy for the long term maintenance of her musculoskeletal problems. EX 51 at 8. Claimant was also examined by Dr. Foltz on October 31, 2002, less than a month before her fall. Dr. Foltz opined that Claimant's condition was stable, but provided a prescription for Vicodin. EX 66 at 2. The record demonstrates that Claimant still suffered from pain and was taking narcotic medication in the year leading up to the incident. Therefore,

[11] Judge Lesniak found Dr. Henrickson's testimony during the 1998 hearing inconclusive because he could not rely upon it to determine reasonableness of medical treatment related to the October 1993 injury. However, Judge Lesniak never specifically ruled that Dr. Henrickson was wrong on a 1994 injury. Rather, he found it impossible to distinguish between Claimant's work injury and pre-existing back condition. EX 1.

because Claimant still suffered from continuous pain up to this point, the fall on Thanksgiving was not an intervening event.

Accordingly, the undersigned finds that Claimant incurred an injury, or aggravation of a pre-existing injury, to her lower back while working for Employer.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty days (30) after the employee or beneficiary is aware of a relationship between the injury or death and the employment. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732-33 (9th Cir. 1985); *Cox v. Brady Hamilton Stevedore Company*, 18 BRBS 10 (1985); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Stark v. Lockheed Shipbuilding and Construction Co.*, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. *Thorud v. Brady-Hamilton Stevedore Company*, 18 BRBS 232 (1986). *See also Bath Iron Works Corporation v. Galen*, 605 F.2d 583 (1st Cir. 1979); *Geisler v. Columbia Asbestos, Inc.,* 14 BRBS 794 (1981).

Section 12(d) specifies the circumstances when failure to give notice under Section 12(a) will not bar a claim. Under Section 12(d) as amended in 1984, 33 U.S.C. § 912(d), which is applicable to this case, the failure to provide timely written notice will not bar the claim if claimant shows either that employer had knowledge during the filing period (subsection 12 (d)(1)) or that employer was not prejudiced by the failure to give timely notice (subsection 12(d)(2)). *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986) (Decision and Order on Reconsideration), *modifying* 18 BRBS 1 (1985); *Derocher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985); *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985).

In the present case, Claimant suffered an injury in February of 1994, while performing inventory work for the Employer. On September 30, 1996, Claimant was examined by Dr. Henrickson, at the request of the Employer. EX 21. In his report, he opined that Claimant experienced significantly increased pain related to lifting activities while doing inventory work in January and February of 1994. EX 21 at 10. Dr. Henrickson also opined that Claimant's symptoms in February 1994 were very different from the low back pain resulting from the October 15, 1993 injury. Additionally, after the 1994 injury, Claimant sought light duty work from the Employer. The regulations explicitly provide that timely notice coincides with the date the employee became aware of a relationship between the injury and employment. 33 U.S.C. §912. Based on the facts at hand, the undersigned finds Claimant became aware of the relationship between her 1994 injury, employment and disability on September 30, 1996, the date of Dr. Henrickson medical report. However, despite this knowledge, Claimant did not file notice of her injury until July 27, 1999. EX 3 at 2. Notice would have been timely if filed by

October 30, 1996. Clearly, Claimant is outside the 30 day prescriptive period rendering the claim time barred on its face.

However, Claimant's failure to give timely notice will not bar her claim because the Employer had both knowledge of the injury and has not shown prejudice as a result thereof. First, knowledge under Section 12(d)(1) generally requires that the employer know of the work-relatedness of the claimant's injury. Knowledge may be imputed to the employer if it knows of the injury and of facts that would lead a reasonable person to conclude that compensation liability is possible. *See Stevenson v. Linen's of the Week*, 688 F.2d 93, 14 BRBS 304 (D.C. Cir. 1982); *Williams v. Nicole Enterprises, Inc.,* 19 BRBS 66 (1986). Actual knowledge is deemed to exist if the employee's immediate supervisor is aware of the injury. 20 C.F.R. §702.216. Here, Employer had actual knowledge of the injury, as Claimant immediately reported the injury to her manager after it occurred. TR at 123. Furthermore, the Claimant was forced off the job because of significant pain, and was later released to light duty work. EX 14 at 3. Employer also had knowledge of the injury on September 30, 1996, when its own medical expert, Dr. Henrickson, opined that Claimant had suffered increased pain due to lifting activities in January and February of 1994. EX 21 at 10. Dr. Henrickson further confirmed his findings when he testified at the August 30, 1998 hearing that Claimant had suffered cumulative trauma in early 1994, which he considered a new injury. August 20, 1998, TR at 80. These facts would lead a reasonable employer to conclude that compensation liability is possible. Therefore, substantial evidence in the record supports the finding that the Employer obtained knowledge of the work-relatedness of Claimant's injury by September 30, 1996.

Second, the claim is not time barred because the Employer failed to show it was prejudiced by lack of timely notice. Prejudice under Section 12(d) is established where the employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. *Bustillo v. Southwest Marine, Inc*., 33 BRBS 15 (1999); *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir.1998), *cert. denied* 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP* [Aples], 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir.1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990). The Employer argues that it was substantially prejudiced by later notice because given the lapse of time, witnesses could not be located and are not available. The undersigned finds that the Employer clearly had an opportunity to adequately conduct its investigation as shown by the presentation of its defense at the hearing. Therefore, the Employer has shown no prejudice in its ability to investigate the claim.

Timely Filing of Claim

Section 13(a) states that, except as otherwise provided, the right to compensation for disability or death shall be barred unless the claim is filed within one year from the time the claimant or the beneficiary becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. 33 U.S.C. § 13(a). The awareness provisions of Sections 12 and 13 are identical. *Bivens*, 23 BRBS 233.

As established in the preceding section, Claimant became aware of the relationship between the February 1994 cumulative injury and her employment on September 30, 1996, the date of Dr. Henrickson's report. However, Claimant did not file a claim until July 27, 1999. EX 3. Clearly the claim is outside the one-year statutory period.

However, Section 13 must be read in conjunction with Sections 30(a) and 30(f) of the Act. *Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1989). Section 30(a) requires that an employer submit to the Secretary of Labor a report of a claimant's injury within ten days of the date it has knowledge of that injury. Pursuant to Section 30(f), the Section 13 filing period is tolled until such time as the employer complies with the requirements of Section 30(a). *See Bustillo*, *supra*; *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Here, the Employer must establish that it complied with the requirements of Section 30 or that it never gained knowledge of Claimant's injury.

In the instant case, the Employer filed a first report of injury pursuant to Section 30(a), on August 3, 1999. EX 4. The Employer noted on the report of injury form that it gained knowledge of the injury from Claimant's LS-203 form dated July 27, 1999. EX 4. However the Employer became aware of Claimant's injury on September 30, 1996, when its own medical expert, Dr. Henrickson, opined that Claimant had suffered increased pain due to lifting activities in January and February of 1994. EX 21 at 10. The Employer was further informed of Claimant's injury by Dr. Henrickson's hearing testimony on August 20, 1998. Therefore because the Employer failed to file a report until August 3, 1999, the Section 13(a) statute of limitations was tolled pursuant to section 30(f), and as a result, the claim filed on July 27, 1999, was timely.

Date of Maximum Medical Improvement

An injured worker's impairment under the Act may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co.,* 22 BRBS 271, 274 (1989); *Phillips v. Marien Concrete Structures*, 21 BRBS 233, 235 (1988*); see also SGS Control Services v. Director, OWCP*, 86 F. 3d 438, 443-44 (5th Cir. 1996). Any disability before reaching MMI would be temporary in nature. *Id*. The date of maximum medical improvement is defined as that time at which the employee has received the maximum benefit of medical treatment such that his condition will not further improve. The determination of the date of MMI is primarily medical and does not rely on economic or vocational considerations. *Louisiana Insurance Guaranty Ass'n v. Abbott,* 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Manson v. Bender Wedling & Machine Co.*, 16 BRBS 307, 309 (1984). Medical evidence must establish the date at which the employee has received the maximum benefit from medical treatment such that his condition will not further improve. *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 60 (1985). Accordingly, the determination as to when maximum medical improvement has been reached, so that a claimant's disability may be termed "permanent," is primarily a question of fact based upon medical evidence. *Lozada v. Director, OWCP*, 903 F. 2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

At issue here is the date on which Claimant's back injury reached maximum medical improvement. Notably, the parties have failed to address this issue; instead, Claimant asserts that she has reached permanent status but no suitable employment can commence, while Employer contests the injury outright. This date must be determined, however, to establish the nature and extent of Claimant's injury. In evaluating this issue, generally the opinion of the claimant's treating physician is to be accorded greater weight because the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos v. Director, OWCP,* 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir.), *cert. denied sub nom. Sea-Land Serv., Inc. v. Director, OWCP,* 528 U.S. 809 (1999).

During the course of treatment, Claimant moved multiple times, thereby rendering impossible consistent treatment by one physician. Indeed, Claimant saw approximately thirty physicians since the date of her initial injury in 1993. As stated above, a judge may rely upon his judgment to resolve conflicts in the medical evidence. *Todd Shipyards Corp.*, 300 F.2d at 741. Taking geographical obstacles as well as the myriad of Claimant's alleged treatment needs into consideration, the undersigned finds that Dr. Foltz had the greatest opportunity to know and observe the Claimant. Therefore, Dr. Foltz is Claimant's treating physician.

Dr. Foltz treated Claimant from January of 1991 until March of 1996.[12] In June of 1996, Claimant moved to Hawaii, which interrupted her treatment with Dr. Foltz. Claimant remained in Hawaii until 1999, at which point she moved to Washington D.C. In 2002, Claimant moved to Oregon. At that time, she resumed care with Dr. Foltz. Dr. Foltz treated Claimant from October 31, 2002, until April 11, 2003. Dr. Foltz discontinued treatment because he had been called to active duty.

Medical reports following Claimant's second spinal fusion show a general trend toward Claimant's improvement.[13] When Claimant returned to Dr. Foltz on October 31, 2002, she admitted that her condition was stable. Nonetheless, Claimant re-injured her back less than one month later when she tripped and fell. After this incident, Claimant returned to Dr. Foltz, who prescribed physical therapy on December 18, 2003. Claimant continued with physical therapy through March of 2003, yet her condition did not appear to improve.

On March 20, 2003, Dr. Rosenbaum evaluated Claimant at Employer's request. In his subsequent report, Dr. Rosenbaum gave no further recommendations for treatment. In a letter dated April 9, 2003, Dr. Foltz ultimately agreed with Dr. Rosenbaum's assessment.[14] Therefore,

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[12] Claimant also saw other doctors while she was under Dr. Foltz's care. Most notably, Dr. Kahanovitz evaluated Claimant in March 1994, performed surgery on Claimant's back in July 1994, and continued to monitor Claimant's status through April 1995. EX 14.

[13] After Claimant's final visit with Dr. Cherrick on December 17, 2001, Dr. Cherrick prescribed therapy for "maintenance" purposes. EX 51. Dr. Gordon's report of April 2, 2002, found that Claimant had regained capacity to go back to work. EX 52.

[14] Dr. Foltz stated that he did not dispute Dr. Rosenbaum's opinion. EX 70.

at the time of Dr. Rosenbaum's evaluation on March 20, 2003, Claimant had reached maximum medical improvement.[15]

Accordingly, the undersigned finds that Claimant's lower back condition reached maximum medical improvement on March 20, 2003.

Extent of Claimant's Disability

Under the Act, Claimant has the initial burden of establishing the extent of her disability. *Trask v. Lockheed Shipbuilding & Constr. Co.* 17 BRBS 56, 60 (1985). Disability under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment…." 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America,* 25 BRBS 100, 110 (1991). As Claimant's lower back condition is a non-scheduled injury, she must prove that she has suffered a loss of wage-earning capacity.

As to the extent of Claimant's disability, under the Act a claimant is presumed to be totally disabled where the claimant establishes an inability to return to the claimant's usual employment. *Manigault v. Stevens Shipping Co.,* 22 BRBS 332, 333 (1989); *Elliot v. C&P Tel. Co.,* 16 BRBS 89, 91 (1984). Here, through medical evidence and expert testimony, Claimant established that following the injury in February of 1994, her lower back condition left her temporary totally disabled from November of 1995 through March of 1997, and from May 14, 1997 through March 20, 2003. However, once Claimant reached maximum medical improvement on March 20, 2003, her condition became permanent and total. I find that Claimant cannot return to her former employment. Therefore, Claimant has met her burden, and is presumed to be totally disabled. *See Walker v. Sun Shipbuilding & Dry Dock Co.,* 19 BRBS 171 (1986).

To rebut the presumption of total disability, the Employer must present evidence of suitable alternate employment that Claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, Employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which Claimant resides, which she can perform given her age, education, work experience and physical restrictions, and for which Claimant can compete and reasonably secure. *Id. at 1042-43; Hansen v. Container Stevedoring Co.,* 31 BRBS 155, 159 n.5 (1997). When the Employer establishes suitable alternate employment, Claimant's total disability becomes partial. *Palombo v. Director, OWCP,* 937 F.2d 70, 73 (2d Cir. 1991).

Here, the Employer asserts that at least 45 jobs were available to Claimant, as identified in the labor market survey performed by Scott Stipe on May 14, 2003, and on January 2, 2004.

[15] In a letter dated March 24, 2003, Dr. Adler reported that Claimant's condition remained unchanged. EX 66. On April 14, 2003, Dr. Rosenbaum re-evaluated Claimant and made no change to his initial assessment. EX 63 Finally, on July 7, 2003, Dr. Lorish opined that there was "nothing more to do from a rehabilitation standpoint." EX 74.

EX 61 and 98. However, only 22 of those employers were hiring at the time.[16] Mr. Stipe provided employers with information of Claimant's work history, education level, and work restrictions.[17] According to Mr. Stipe, the positions identified in his report were within Claimant's physical limitations, comported with her educational and vocational background, and were locally available.

The first of these positions, Telemarketer for the Oregonian in Portland, Oregon, paid $8.00 to $8.50 per hour. EX 61 at 10. The employer had an opening and generally hired 2 to 3 people per month. The employer opined that Claimant met the job requirements and could perform the essential functions of the job.[18]

The second position, Appointment Setter for Crime Free Security in Portland, Oregon, paid $7.00 to $8.00 per hour and had one part-time opening. EX 61 at 11.

The third position, Fundraiser in Portland, Oregon, paid $8.00 per hour and had an opening for a part-time employee. EX 61 at 12. The employer stated it typically hired more than 5 employees per month.

The fourth position, Market Researcher in Portland, Oregon, paid $7.00 to $9.00 per hour and had an opening. EX 61 at 13.

The fifth position, Parking Attendant/Cashier at the Portland Hilton in Portland, Oregon, paid $8.50 per hour and had an open position. EX 61 at 13.

The sixth position, Cashier at City Center Parking in Portland, Oregon, paid $8.50 an hour and had one opening. EX 61 at 14. The position entailed taking tickets, giving change to customers, counting cash at the end of the shift and performing customer service responsibilities. EX 61 at 26. The position required frequent reaching to receive tickets and money and standing was optional as all parking booths have stools. EX 61 at 27.

The seventh position, Lot Cashier at the Thrifty Airport Parking in Portland, Oregon, paid $8.00 and had openings. EX 61 at 14.

The eighth position, Parking Lot Attendant at Ace Parking paid $7.40 per hour and had 3 part-time positions available with possible bids to move to full time. The employer hired 4-5 employees a month. EX 61 at 14.

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[16] The first 18 positions are discussed in Stipe's first market survey dated May 14, 2003. EX 61. The remaining four positions are discussed in the supplemental survey dated January 1, 2004. EX 98.

[17] Based on the evaluation and Claimant's medical evidence the work restrictions included the following: "able to do sedentary/light work (20 pounds occasional, 10 pounds frequent lifting, limited bending, must be able to change positions from sitting to standing/walking frequently)."

[18] Mr. Stipe failed to include in his labor market survey the specific job requirements or qualifications for all of the employers surveyed. However, each employer opined that Claimant met the job requirements and could perform the essential functions of the job.

The ninth position, Security Guard at Pro Star Security in Portland, Oregon, paid $7.50 to $8.00 per hour and had two openings. EX 61 at 15. The employer hires approximately 15 workers per month. *Id.*

The tenth position, Gate Guard at Burns International in Portland, Oregon, was a full-time position that paid $8.00 to $9.00 per hour. EX 61 at 15. There were 8 job openings and the employer hired approximately 20 people per month. *Id.* This position entailed logging in data and watching for problems in the area. EX 61 at 24. Employees may be required to arrest trespassers. *Id.* The position required standing while performing all essential functions and occasional sitting up to and less than 3 hours in a shift. *Id.*

The eleventh position, Security Guard at Waken Hut in Beaverton, Oregon, paid $8.00 to $10.00 per hour and had current openings. EX 61 at 16. The employer has hired 4 to 8 people per month. *Id.*

The twelfth position, Security Guard for Ace Event Services in Portland, Oregon, paid $8.50 per hour and had one part-time position available. EX 61 at 16.

The thirteenth position, Security Gate Guard for Advanced Security in Portland, Oregon, paid $8.00 to $10.00 per hour and had a current opening. EX 61 at 17. The employer stated they have approximately 3 openings per month. *Id.*

The fourteenth position, Tow Truck Operator for Hillsboro Towing in Portland, Oregon, paid $8.00 to $8.50 an hour and had one open position. EX 61 at 18.

The sixteenth position, Front Desk Clerk for Comfort Suites in Portland, Oregon, paid $7.00 per hour and had a current opening. EX 61 at 20. The position entailed greeting and registering customers, receiving incoming calls, making reservations, bookkeeping and cashier duties. EX 61 at 30. The physical demands included occasional standing, sitting, walking, and carrying and lifting up to 10 pounds. EX 61 at 31.

The seventeenth position, Motel Clerk for Holiday Inn Express in Portland, Oregon, paid $7.00 to $7.50 per hour and had 2 openings. EX 61 at 22.

The eighteenth position, Motel Clerk for Holiday Inn Airport in Portland, Oregon, paid $7.50 per hour and had 2 openings. EX 61 at 22.

The nineteenth job, Motel Clerk for Comfort Suites, paid $7.25 per hour and had one opening for a 25-hour per week position. EX 98 at 1.

The twentieth position, Telemarketer for Encompass, paid $7.00 to $8.00 per hour, and had one opening. EX 98 at 2.

The next position, Telemarketer/Appointment Setter for Cascade Auto Glass, paid $7.00 per hour with bonus and had many recent openings. EX 98 at 2.

The last position, Telemarketer for Cyber Rep, paid $7.50 per hour and had several recent openings. EX 98 at 2.

Dr. Taylor opined that while some of these positions may be within Claimant's physical capacities, Claimant will not be motivated to return to the workforce based on the amount of pain and discomfort she is experiencing. Dr. Taylor approved the cashier position, but testified Claimant's work limitations would prohibit repeated bending or lifting of more than 20 pounds, and must allow for mini breaks to stretch and change positions Id. at 46-7; CX 20 at 70. Her return to work would have to be done in stages to get her into the frame of mind that would motivate her. Moreover, Claimant would need to be part time, 3-4 hours a day, maybe three days a week to begin with. *Id*. at 47-8. Dr. Taylor does not believe her medication will interfere, rather it might permit her to work. *Id*. at 49-50.[19]

Dr. Rosenbaum also opined that some of the positions indicated on the vocational rehabilitation report were within Claimant's capabilities. He agreed with Dr. Taylor that Claimant was capable of performing primarily cashier duties. CX 18 at 69. However, from an objective standpoint, if employed by a convenience store, additional stock duties may increase her symptoms. Claimant is capable of stocking shelves with light items such as Ritz crackers or popcorn. *Id*. at 67. If she had to spend an hour throughout the day stocking, Dr. Rosenbaum would limit lifting to 15 pounds. *Id*. at 69. However, Dr. Rosenbaum opined that a significant amount of stocking shelves with items such as beer and soda would be beyond her capabilities. *Id*. at 68.

Dr. Schulman opined that while Claimant is an intelligent person, her preluteal mood disorder and psychogenic pain disturbance could interfere with her ability to work. CX 19 at 68 and 72-73. However, he noted Claimant's condition would improve if she were working. *Id*. Dr. Schulman did not specify which positions were within Claimant's capabilities.

Dr. Gordon opined the vast majority of jobs listed fall within the light to sedentary work capacity and Claimant has the physical capacity for at least a full range of such work activity. EX 90. However, because Claimant's main limitations are heavy lifting and repeated bending, Dr. Gordon opined the tow truck operator and security guard positions could pose potential problems if she has to attach the car to the truck or arrest trespassers.

Based on the evidence provided in the record, the undersigned finds the telemarketer, appointment setter, market researcher, parking attendant, and front desk/motel clerk positions all comport with Claimant's physical restrictions, employment experience, and education level. Claimant is restricted to performing light duty to sedentary work, should not lift more than 20 pounds occasionally or 10 pounds frequently, and is limited to jobs where she can sit and stand at her option. TR at 256. None of the positions required bending and twisting and some of the jobs only required occasional walking and standing. Furthermore, the positions are located within the geographical area in which Claimant resides. Accordingly, the undersigned concludes the

[19] However, Dr. Taylor admits the drug Soma that makes Claimant sleepy may interfere with some of the job titles she could possibly do. *Id*. at 49-50.

Employer established the existence of suitable alternate employment on May 14, 2003, thereby rebutting a presumption of total disability. [20]

If Claimant is able to present evidence of her diligence in searching for employment, she may nonetheless still be considered totally disabled. *Palombo,* 937 F.2d at 73; *Turner*, 661 F.2d at 1043. Claimant is not required to apply for the specific jobs identified by Employer, but need only establish that she was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *Turner*, 661 F.2d at 1043. Claimant bears the burden of proving a diligent search and willingness to work. *Palombo,* 937 F.2d at 73.

According to Claimant, she investigated the positions provided in the labor market survey report, but did not believe she was capable of performing the work. Specifically, Claimant testified that she is unable to perform security work because she has a difficult time paying attention; she is unable to perform telemarketer and dispatcher duties because of her inability to work a computer and read well; and she is unable to work as a motel clerk because she has a problem being cordial to the public. TR at 180-2. Despite Claimant's testimony, she failed to provide evidence of the numbers, names, job description or job search protocol to establish evidence of the amount of effort that was actually put into the job search process. As Claimant carries the burden on this issue, the undersigned finds that she has failed to show that she conducted a diligent search for employment. As a result, the undersigned finds Claimant was capable of employment earning at least her pre-injury wage as of May 14, 2003. *See Palombo,* 937 F.2d at 77.

Compensation

Claimant's compensation is based on her average weekly wage, which is calculated using one of the methods described in Section 10 of the Act. 33 U.S.C. § 910(a)-(d); *Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1987). In the instant case, the parties stipulated that Claimant's compensation rate is $130.17.

The Employer overcame the presumption of Claimant's total disability as of May 14, 2003. Claimant, however, met her burden of establishing temporary total disability from November 6, 1995 through March 30, 1997 and from May 14, 1997 through March 20, 2003, the date she became permanent and stationary. As such, she is entitled to disability benefits covering those specified time periods at the stipulated compensation rate of $130.17. Claimant is also entitled to permanent total disability from March 20, 2003 through May 14, 2003, at the rate of $130.17.[21]

[20] The Employer submitted a retroactive labor market survey performed by Barbara Byers on May 20, 2003. EX 71. Ms. Byers labor market survey identified 32 jobs available to Claimant and covers the timeframe of August 1, 1999 to June 1, 2002, including jobs open in August 1999 and October 2000. EX 71 at 1. However, the undersigned chooses to follow the labor market survey performed by Mr. Stipe and therefore finds that Claimant became permanent partial on May 14, 2003.

[21] All calculations are to be determined by the District Director.

Claimant is not entitled to compensation after May 14, 2003, for the following reason. The Employer presented evidence of suitable alternate employment on May 14, 2003. According to the labor market survey, the positions available to Claimant pay between $7.00 to $10.00 per hour. As Claimant's post injury wage earning capacity is significantly more than her pre-injury wage earning capacity she no longer suffers a loss in wage earning capacity. Therefore, she is no longer entitled to compensation as of May 14, 2003.

Employer's Entitlement to Section 8(f) Relief

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present: 1) the claimant had a pre-existing permanent partial disability prior to the last injury; 2) the pre-existing disability was manifest to the employer prior to the last injury; and 3) the disability, if total, is not due solely to the most recent injury. 33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 25 BRBS 85, 87, 951 F.2d 1143 (9th Cir. 1991); *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co*. (Carmines), 138 F.3d at 138-39. In the present case, claimant has been found entitled to less than 104 weeks of compensation once she reached maximum medical improvement. Thus, the issue of the applicability of Section 8(f) of the Act in this case is moot.

Entitlement to Medical Expenses

Claimant seeks compensation for medical expenses related to her lower back condition. Under Section 7(a) of the Act, reasonable and necessary medical expenses incurred since the industrial injury may be assessed against the employer. 33 U.S.C. §907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. §702.402; *Pardee v. Army & Air Force Exch. Serv.,* 13 BRBS 1130, 1138 (1981). The record establishes Claimant has outstanding medical bills to Dr. Jonathon Blatt at the Providence Milwaukie Medical Center in the amount of $406.13; Radiologist Dr. Sharon Zhu in the amount of $26.66; Dr. Thomas Lorish in the amount of $50.74; South West Washington Medical Center in the amount of $310.95; and Cascade Family Medicine in the amount of $389.00. Accordingly, the undersigned finds the Employer is liable for all outstanding medical bills related to Claimant's disability and shall furnish reasonable, appropriate, and necessary medical care and treatment as required by Section 7 of the Act.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 556, 559 (1978), *aff'd in part, rev 'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro, 26 BRBS 147 (1992); Byrum v. Newport News Shipbuilding & Dr Dock Co.,* 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co*., 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by the Enployer should be included in the District Director's calculations of amounts due under this decision and order.

Attorney's Fees and Costs

Thirty (30) days is hereby allowed to Claimant's counsel from the submission of such an application. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED**, that:

1. The Employer shall pay Claimant compensation for temporary total disability for the period commencing November 6, 1995 through March 30, 1997, and May 14, 1997 through March 20, 2003, at the compensation rate of $130.17.

2. The Employer shall pay to the Claimant permanent total disability payments for her unscheduled injuries commencing March 20, 2003 through May 14, 2003, at the rate of $130.17.

3. Pursuant to Section 7 of the Act, the Employer shall pay all outstanding medical bills related to Claimant's disability and shall furnish reasonable, appropriate and necessary medical care and treatment as required by Section 7 of the Act.

4. The Employer shall pay interest on the above sums as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

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Russell D. Pulver
Administrative Law Judge